

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	MB Docket No. 14-82
)	
PATRICK SULLIVAN)	FRN 0003749041, 0006119796,
(Assignor))	0006149843, 0017196064
)	
and)	Facility ID No. 146162
)	
LAKE BROADCASTING, INC.)	File No. BALFT-20120523ABY
(Assignee))	
)	
Application for Consent to Assignment of)	
License of FM Translator Station W238CE,)	
Montgomery, Alabama)	

To: Richard L. Sippel
Chief Administrative Law Judge

**ENFORCEMENT BUREAU'S
MOTION TO STRIKE OR, IN THE ALTERNATIVE,
REQUEST FOR A STATUS CONFERENCE**

1. The Presiding Judge has provided for the orderly production of expert evidence in this case. The Presiding Judge has overseen the timing of the exchange of expert reports, Lake Broadcasting, Inc. (Lake)'s production to the Enforcement Bureau (Bureau) of the raw data of the tests performed by Lake's expert, and finally, the depositions by each party of the opposing party's experts.¹ In *Order*, FCC 16M-20, the

¹ Although the Presiding Judge did not set a specific date for the exchange of the parties' expert reports, the Federal Rules of Civil Procedure, to which this court looks for guidance, requires that experts submit their reports before their deposition. *See* Fed. R. Civ. P. 26(b)(4)(A) (recognizing that if an expert report is required, "the deposition may be conducted only after the report is provided"). *See also In re Baycol Products Litigation*, 596 F. 3d 884 (8th Cir. 2010) (courts have broad discretion to order compliance with discovery orders and procedures and the court did not abuse its discretion by striking expert report filed seven months after deposition).

Presiding Judge required that all depositions be concluded by September 16, 2016.² In accordance with this Order, the Bureau took the deposition of Lake's expert, Dr. Duncan-Hively, on September 15, 2016.

2. Yet, on September 26, 2016, eleven days after the Bureau deposed Dr. Duncan-Hively, Lake produced an *additional* expert opinion from Dr. Duncan-Hively based on a test she performed *after* her deposition.³ Specifically, Lake now submits for the record its expert's September 24, 2016 analysis based on an additional psychological examination – the Abel Assessment of Sexual Interest (Abel Assessment) – performed on September 20, 2016.⁴ Thus, the Bureau had no opportunity to depose Dr. Duncan-Hively concerning either her September 24, 2016 additional analysis or the September 20, 2016 Abel Assessment on which it is based. Nevertheless, Lake informed the Bureau that it intends to include these two documents in its direct case exhibits.⁵ For the reasons set forth below, the Bureau respectfully moves to strike Lake's untimely expert submission.

3. First, if this additional evidence were allowed into the record, it would necessarily result in additional delay. At a minimum, the Bureau's expert would have to review the raw data associated with the Abel Assessment and be given the opportunity to respond to the data and Dr. Duncan-Hively's newly-provided opinion. In all likelihood, this could lead to the need for additional depositions of both parties' expert witnesses.⁶ The Bureau is anxious to see this case proceed without further delay.

² See *Order*, FCC 16M-20 (ALJ, rel. Jun. 21, 2016); see also *Order*, FCC 16M-22 (ALJ, rel. Jul. 20, 2016).

³ See Lake Broadcasting, Inc.'s Production of Documents Following September 15, 2016 Deposition, filed Sept. 26, 2016 (Lake's Production).

⁴ See Lake Production at Exhibit A.

⁵ See Lake Production at 1.

⁶ The Bureau believes any additional deposition of Lake's expert witness necessitated by Lake's untimely submission should be at the sole expense of Lake and should occur in Washington, D.C. See *Euquant*

4. Second, to allow Lake to introduce this supplement expert submission now, after the Bureau's opportunity to depose Dr. Duncan-Hively has already passed, would be highly prejudicial to the Bureau's case. This late submission is particularly egregious because Dr. Duncan-Hively could have conducted an Abel Assessment of Mr. Rice at any time *before* her deposition and for some reason, chose not to do so. Indeed, the record is clear that Dr. Duncan-Hively was not only aware of the Abel Assessment and what it measured, but that her practice was authorized to conduct it and had experience doing so.⁷ The Bureau suggests that if Dr. Duncan-Hively truly believed the Abel Assessment was of any real probative value in assessing Mr. Rice's sex offender risk, she would have (and should have) included it as part of her initial expert submission.

5. It would appear, therefore, that Dr. Duncan-Hively conducted the Abel Assessment and submitted a new analysis based on that test only because the Bureau's expert, Dr. Weitzl, questioned the Static-99R assessment that Dr. Duncan-Hively had already performed.⁸ Lake should not be allowed to introduce new evidence in its favor simply because the initial evidence it submitted may not be as strong as it originally expected.

6. Accordingly, the Bureau respectfully requests that the Presiding Judge strike Lake's untimely submission of Dr. Duncan-Hively's September 24, 2016 opinion and the results of the September 20, 2016 Abel Assessment. In the alternative, the Bureau requests that the Presiding Judge schedule a status conference to discuss

Integration Services, Inc. v United Rentals (North America), Inc., 217 F.R.D. 113 (2003) (denying motion to strike supplemental expert report submitted on the eve of expert deposition but permitting further deposition of the expert at the submitter's expense).

⁷ See, e.g., Transcript of Deposition of Dr. Ann Duncan-Hively, dated Sep. 15, 2016 (Duncan-Hively Tr.) at 13:20-14:15; 71:15-18.

⁸ See Transcript of Deposition of Dr. Kimberly Weitzl, dated Sep. 14, 2016 (Weitzl Tr.) at 12-16.

procedures and timing for the Bureau to conduct the additional discovery necessary to respond to Lake's untimely expert submission.

Respectfully submitted,

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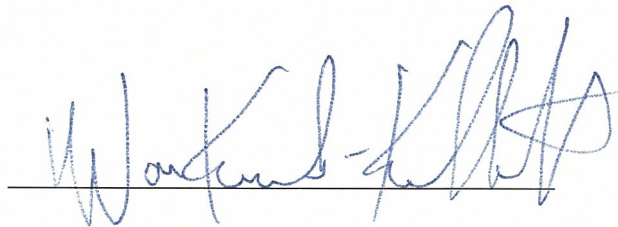
CERTIFICATE OF SERVICE

I, William Knowles-Kellett, an attorney in the Enforcement Bureau's Investigations & Hearings Division, certify that on this 7th day of October, 2016, sent via First Class United States Mail and via email copies of the foregoing ENFORCEMENT BUREAU'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, REQUEST FOR A STATUS CONFERENCE to:

Jerold L. Jacobs, Esq.
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Counsel for Patrick Sullivan and Lake Broadcasting, Inc.

A copy of the foregoing also was served via hand-delivery to:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W., Room 1-C861
Washington, DC 20554

A handwritten signature in blue ink, appearing to read "William Knowles-Kellett", is written over a horizontal line.